(21)

No. 94-1837

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1995

BARNETT BANK OF MARION COUNTY, N.A.,

Petitioner,

v.

BILL NELSON, INSURANCE COMMISSIONER OF THE STATE OF FLORIDA, *et al.*,

Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Eleventh Circuit

BRIEF OF THE AMERICAN COUNCIL OF LIFE INSURANCE AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENTS

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The American Council of Life Insurance hereby files this brief as *amicus curiae* in support of the Respondents in accordance with Rule 37.3 of the Supreme Court Rules. All parties have consented to the filing of this brief.

INTEREST OF THE *AMICUS CURIAE*

The American Council of Life Insurance ("ACLI") is a non-profit trade association of 640 stock and mutual life insurance companies. Collectively, ACLI member companies hold approximately 91 percent of the life insurance in force in the nation. ACLI has long been active in administrative, legislative,

and litigation matters regarding the permissible scope of insurance activities by banks.

ACLI has a strong interest in this case. Petitioner advances an interpretation of the McCarran-Ferguson Act, 15 U.S.C. § 1011 *et seq.*, that would significantly diminish the power of states to regulate the business of insurance. Indeed, ACLI is concerned that Petitioner and its *amici* seek much more than the invalidation of the Florida anti-affiliation statute at issue here. Rather, they seek a fundamental dismantling of state insurance regulation. ACLI members would be adversely affected by such an outcome, which would violate both the letter and spirit of the McCarran-Ferguson Act.

SUMMARY OF ARGUMENT

In adopting the McCarran-Ferguson Act in 1945, "Congress' purpose was broadly to give support to the existing and future state systems for regulating and taxing the business of insurance." *Prudential Ins. Co. v. Benjamin*, 328 U.S. 408, 429 (1946). "There is no question that the *primary* purpose of the McCarran-Ferguson Act was to preserve state regulation of the activities of insurance companies." *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205, 218 n. 18 (1979) (emphasis in original).

Section 2(b) of the Act implements this policy by reversing ordinary federal preemption principles for state insurance laws that were enacted "for the purpose of regulating the business of insurance." The only exception to this reverse preemption is for conflicting federal laws that "specifically relate[] to the business of insurance."

Petitioner construes these key terms to create a logical paradox that would undermine the Act. The reverse-preemption clause applies when federal and state laws both touch upon an insurance-related matter. According to petitioner, the Act applies an exacting standard when defining those state laws that

are protected from federal preemption, preserving only those state provisions that directly regulate the insurer-policyholder relationship. Petitioner contrasts this purported standard with the provision defining those federal statutes that still preempt state insurance laws. Conveniently and repeatedly omitting the word "specifically" from its quotation of § 2(b)'s reverse preemption clause, petitioner argues (Pet. Br. at 13):

> The word 'relates' — which is the critical term in the second prong of the test prescribed by Section 2(b) of the McCarran-Ferguson Act — is obviously broader than the term 'regulating,' which controls the first prong of the test.

So construed, the Act would create a strong presumption in favor of federal preemption of state insurance laws. Under petitioner's construction of the reverse preemption clause, every state law that "regulate[s]" the business of insurance would be preempted by a conflicting federal law that satisfied the supposedly "obviously broader" requirement that it "relate" to insurance.

But Congress intended exactly the opposite. Petitioner's construction ignores the plain language of the Act, and would undermine the Act's policy of preserving more than a century of state insurance regulation while permitting federal preemption in limited circumstances. Petitioner's version of the McCarran-Ferguson Act would provide for broad federal preemption on insurance matters. This Court should not adopt that transformation of the McCarran-Ferguson Act.

Petitioner also urges this Court narrowly to restrict the class of state insurance regulations that have the "purpose of regulating the business of insurance" and thus are protected by the reverse preemption clause of § 2(b). In making this argument, petitioner ignores this Court's holdings that the reverse preemption clause applies to any state law that regulates, directly or indirectly, any of the many facets of the relationship between

insurers and policyholders. Petitioner offers no adequate reason for this Court to abandon its broad construction of this provision.

ARGUMENT

I. ONLY FEDERAL LAWS SPECIFICALLY ADDRESSING THE INSURANCE BUSINESS MAY PREEMPT STATE LAW

Because Congress sought to preserve state insurance regulation, the McCarran-Ferguson Act exempts only a small class of federal statutes from its reverse preemption clause: those federal laws that "specifically relate" to the business of insurance. Petitioner's attempt to undo that careful statutory structure is based on a simple rhetorical gambit. Omitting "specifically" from most of its descriptions of the statute, petitioner urges the Court to rely on cases that broadly construe the word "relate" when it is unmodified by "specifically." Pet. Br. at 43 (citing *Morales v. Trans World Airways*, 504 U.S. 374, 383-84 (1992) and *Smith v. United States*, 113 S. Ct. 2050, 2058 (1993)).

Based on this rewriting of the statute, petitioner announces that the class of federal statutes exempted from the reverse preemption clause is "expansive." Pet. Br. at 45. Petitioner then reaches the remarkable conclusion that "[t]he word relates — which is the critical term in the second prong of the test prescribed by Section 2(b) of the McCarran-Ferguson Act — is obviously broader than the word 'regulating,' which controls the first part of the test." Pet. Br. at 13.

But this argument would turn the McCarran-Ferguson Act on its head. If the class of federal laws that are exempt from reverse preemption is broader than the class of state laws preserved by the Act, then the reverse preemption clause has little meaning. Under petitioner's reading of the reverse preemption clause, whenever a state statute "regulates" the business of insurance, any conflicting federal statute necessarily will "specifically relate" to the insurance business. Consequently, every

time a state regulation falls within the protection of the Act, under petitioner's argument, a conflicting federal law nevertheless would automatically preempt the state regulation. Petitioner thereby construes the reverse preemption clause largely out of existence.

The plain language of the reverse preemption clause illustrates the error of petitioner's argument. To reach its goal of preserving state insurance laws except when Congress specifically overrides those laws, Congress selected language to ensure that the protection for state insurance regulations is broader than the exemption for conflicting federal laws. The key to this outcome, of course, is the word in the reverse preemption clause that petitioner so repeatedly omits: "specifically." Federal statutes are exempt from reverse preemption only if they *specifically* relate to the business of insurance.

Webster's Collegiate Dictionary 1128 (10th ed. 1993) defines "specific" as:

> 1a. constituting or falling into a specifiable catgory; b. sharing or being those properties of something that allow it to be referred to a particular category; 2a. restricted to a particular individual, situation, relation, or effect . . .; b. exerting a distinctive influence . . .; 3. free from ambiguity. . .

Similarly, Black's Law Dictionary 1398 (6th ed. 1990), defines that same word as follows:

> Precisely formulated or restricted; definite; explicit; of an exact or particular nature...Having a certain form or designation; observing a certain form; particular; precise; tending to specify, or to make particular, definite, limited, or precise.

Thus, the "specifically relate" exemption is far from expansive; rather, it includes only federal laws that relate to the business of insurance in a "precisely formulated or restricted,"

"explicit" or "definite" way. *See, e.g., Lohr v. Medtronic, Inc.*, 56 F.3d 1335, 1346 (11th Cir. 1995) ("the plain meaning of the term 'specific' . . . [is] 'having a real and fixed relationship to [and] restricted by nature to a particular individual, situation, relation, or effect'") (quoting Webster's New International Dictionary 2187 (3d ed. 1976)).

Accordingly, this Court has recognized that only federal laws explicitly intended to regulate the business of insurance are "specifically related" to the business of insurance under McCarran-Ferguson. In *Prudential*, the Court explained that the McCarran-Ferguson Act effectively establishes a presumption that federal laws do not apply to insurance matters, "except as otherwise *expressly provided* in the Act itself or in future legislation." 328 U.S. at 429-30 (emphasis added). In other words, a federal law will not preempt state insurance regulation unless it "expressly provide[s]" that it does so.

United States Department of the Treasury v. Fabe, 113 S. Ct. 2202 (1993), reached the same conclusion. There, the Court stated (*id.* at 2211 (emphasis added)):

> [The McCarran-Ferguson Act] transformed the legal landscape by overturning the normal rules of preemption. Ordinarily, a federal law supersedes any inconsistent state law. *The first clause of § 2(b) reverses this by imposing what is, in effect, a clear statement rule, a rule that state laws enacted 'for the purpose of regulating the business of insurance' do not yield to conflicting federal statutes unless a federal statute specifically requires otherwise.*[1]

[1] *Amici* American Bankers Association, et al., and New York Clearing House Association urge the Court not to consider this holding in *Fabe*, dismissing it as dicta. Amer. Bankers Ass'n Br. at 9-10 & n. 6; NYCHA Br. at 10-11. But the quoted language was an integral part of *Fabe*'s central holding that the McCarran-Ferguson Act must be construed to effectuate its purpose of preserving state insurance regulation.

This "clear statement rule" acknowledges the essential nature of a reverse preemption clause such as § 2(b). If preemptive force were preserved for any federal law incidentally affecting the insurance business, then § 2(b) would become a futile and endless loop; it would classify certain state insurance regulations as appropriate for protection from federal preemption, but would then allow any conflicting federal law to preempt the state regulation anyway. Only by enforcing *Fabe*'s clear statement rule — which is squarely based on the statutory term "specifically" — can the ordinary rules of federal preemption be "reversed" as Congress intended.

Thus far, this Court has found only one federal statute, ERISA, that "specifically relates" to the business of insurance under the reverse preemption clause of § 2(b). *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 114 S. Ct. 517, 525 (1993). *Harris Trust* noted the " 'deliberately expansive' character of ERISA's preemption provisions . . . ." 114 S. Ct. at 525 n. 8 (quoting *Pilot Life Ins. Co. v. Dedeaux*, 481 U.S. 41, 45-46 (1987)). For example, ERISA provides that it "shall supersede any and all state laws insofar as they may now or hereafter relate to any employee benefit plan." 29 U.S.C. § 1144(a). Another provision, ERISA's "deemer clause," provides:

> Neither an employee benefit plan . . . nor any trust established under such a plan shall be deemed to be an insurance company or other insurer, bank, trust company, or investment company or to be engaged in the business of insurance or banking for purposes of any law of any State purporting to regulate insurance companies, insurance contracts, banks, trust companies, or investment companies.

29 U.S.C. § 1144(b)(2)(B).

ERISA thus meets *Fabe*'s clear statement test for the reverse preemption clause of § 2(b): Congress explicitly indicated

its intent to preempt state laws that conflict with ERISA's integrated regulation of employee benefit plans.[2] There is no such clear statement in 12 U.S.C. § 92. Rather, § 92 falls into the same category as statutes like the Federal Employees' Compensation Act, the Truth in Lending Act, CERCLA, RICO, and the Federal Arbitration Act. All of these statutes have been held to relate only incidentally to the business of insurance and thus, not to defeat McCarran-Ferguson's strong presumption in favor of preserving state insurance regulation.[3]

Whether or not § 92 might be said to relate in some fashion to the business of insurance, it surely does not *specifically* relate to that business. Indeed, the United States and the Comptroller of the Currency, writing as *amici*, admit that "Section 92 does not appear to *regulate* the business of insurance . . . ," Govt. Br. at 18 (emphasis in original), adding: "We may certainly assume that in authorizing national banks in small towns to sell insurance, Congress's primary purpose was to regulate banking." *Id.* at 20. This admission should end the inquiry. A federal statute cannot indirectly "specifically relate" to the business of insurance. If a federal *banking* law like § 92 lacks any ERISA-type

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[2] Even ERISA's clear preemptive provisions have important limits. In *New York State Conference & Blue Cross & Blue Shield Plans v. Travelers Ins. Co.*, 115 S. Ct. 1671 (1995), this Court ruled that certain state hospital cost regulations did not sufficiently "relate to" ERISA to trigger the federal act's preemption provisions.

[3] *See, e.g., Cochran v. Paco, Inc.*, 606 F.2d 460, 464 (5th Cir. 1979) (Truth in Lending Act); *Hamilton Life Ins. Co. v. Republic Nat'l Life Ins. Co.*, 408 F.2d 606, 611 (2d Cir. 1969) (Federal Arbitration Act); *Kachanis v. United States*, 844 F. Supp. 877, 882-83 (D.R.I. 1994) (FECA); *LeDuc v. Kentucky Cent. Life Ins. Co.*, 814 F. Supp. 820, 827 (N.D. Cal. 1992) (RICO); *Hudson Ins. Co. v. Double D Management Co.*, 768 F. Supp. 1538, 1541-42 (M.D. Fla. 1991) (CERCLA). Strikingly, the parties in *Fabe* agreed that the federal statute granting first priority to claims of the United States against companies in liquidation — which included insurance companies — did not "specifically relate" to the business of insurance.

clear statement of exemption, it cannot preempt a state insurance regulation.

This conclusion produces a reasonable outcome in this case. In the many states which allow insurance agents to affiliate with banks, § 92 would continue to authorize insurance agency activities by national banks in towns with fewer than 5,000 persons. But if a state determines, as Florida has determined, that such an affiliation disrupts the marketing of insurance and risks injury to consumers, the reverse preemption clause of the McCarran-Ferguson Act ensures that such a determination will apply to both state and federally chartered banks in that state. The result is a consistent public policy that preserves the federalism principles that prompted the McCarran-Ferguson Act.

II. THE MCCARRAN-FERGUSON ACT PROTECTS STATE INSURANCE REGULATIONS LIKE F.S.A. § 626.988 FROM FEDERAL PREEMPTION

In order "broadly to give support to the existing and future state systems for regulating and taxing the business of insurance," *Prudential Ins. Co.*, 328 U.S. at 429, the McCarran-Ferguson Act expansively defines the class of protected state laws as those enacted "for the purpose of regulating the business of insurance." 15 U.S.C. § 1012(b). Mischaracterizing the cases that have considered this phrase, petitioner offers a crabbed reading of this language: "a law 'enacted . . . for the purpose of regulating the business of insurance' must be directed toward the rights and obligations that arise from the contractual relationship between insurance companies and their policyholders." Pet. Br. at 39. Petitioner's restrictive standard is inconsistent with the statutory language and this Court's precedents.

A. The State Regulation Provision: National Securities

This Court has applied the state regulation provision of § 2(b)'s reverse preemption clause in only two cases, *SEC v.*

National Securities, Inc., 393 U.S. 453 (1969), and *Fabe*. In *National Securities*, a state law required the Arizona Director of Insurance to make a finding whether a proposed merger between state insurance companies was "[i]nequitable to the stockholders of any domestic insurer" or otherwise "contrary to law." 393 U.S. at 457 (citing Ariz. Rev. Stat. Ann. § 20-731 (Supp. 1969)). The question presented was whether a favorable finding by that state official barred the SEC from acting against the insurance companies for misstatements in proxy materials. Finding that the Arizona statute was "attempting to regulate not the 'insurance' relationship, but the relationship between a stockholder and the company in which he owns stock," 393 U.S. at 460, the Court held that the statute was not enacted for the purpose of regulating the business of insurance. *Id.* at 457.

National Securities made clear, however, that a state law need not directly regulate the "insurance relationship" in order to be protected under McCarran-Ferguson; the state statute need only be aimed at ultimately affecting that relationship (393 U.S. at 460 (emphasis added)):

> The relationship between insurer and insured, the type of policy which could be issued, its reliability, interpretation, and enforcement — these were the core of the 'business of insurance.' *Undoubtedly, other activities of insurance companies relate so closely to their status as reliable insurers that they too must be placed in the same class.* But whatever the exact scope of the statutory term, it is clear where the focus was — it was on the relationship between the insurance company and the policyholder. *Statutes aimed at protecting or regulating this relationship, directly or indirectly, are laws regulating the 'business of insurance.*

The critical phrase here is that federal law will not ordinarily preempt state statutes that protect or regulate the policyholder relationship, whether "directly or indirectly."

B. The Antitrust Provision: Royal Drug and Pireno

In the years after *National Securities*, the Court twice construed the antitrust immunity provision of § 2(b). In *Group Life & Health Ins. Co. v. Royal Drug Co.*, 440 U.S. 205 (1979), the issue was whether a drug-purchasing agreement between an insurer and certain pharmacies fell within the "business of insurance" as that phrase is used in the second clause of § 2(b). That second clause provides that federal antitrust laws apply to the business of insurance only to the extent that the business is not regulated by state law. The Court held that the pharmacy agreements were not part of the "business of insurance" because they related neither to the spreading or underwriting of risk nor to the contractual relationship between the insurer and the policyholder. 440 U.S. at 214-16.

The dissenters in *Royal Drug* objected that the Court's test for "business of insurance" was too strict since "Congress deliberately chose to phrase the exemption broadly," 440 U.S. at 234-35 (Brennan, J., dissenting). The Court responded that its test applied only to § 2(b)'s *antitrust* element, not to the broader reverse preemption for state regulation (*id.* at 218 n.18):

> The repeated insistence in the dissenting opinion that the McCarran-Ferguson Act should be read as protecting the right of States to regulate what they traditionally regulated is thus entirely correct — and entirely irrelevant to the issue now before the Court. . . . For the question here is not whether the McCarran-Ferguson Act made state regulation of these Pharmacy Agreements exempt from attack under the Commerce Clause. It is the quite different question whether the Pharmacy Agreements are exempt from the antitrust laws.

Royal Drug's narrow construction of the "business of insurance" also relied on the principle that "exemptions from the antitrust laws are to be narrowly construed." 440 U.S. at 231. In short, because *Royal Drug* was an antitrust decision, the Court did not apply *National Securities*' broader "directly or indirectly related" standard.

Union Labor Life Ins. Co. v. Pireno, 458 U.S. 119 (1982), considered whether an insurer violated federal antitrust laws by employing a state-sanctioned peer review committee to determine appropriate reimbursement rates. *Pireno* applied a three-part test, derived from *Royal Drug*, for "business of insurance" under the antitrust clause of § 2(b):

> *first*, whether the practice has the effect of transferring or spreading a policyholder's risk; *second*, whether the practice is an integral part of the policy relationship between the insurer and the insured; and *third*, whether the practice is limited to entities within the insurance industry.

Id. at 129 (emphasis in original). As in *Royal Drug*, the *Pireno* Court formulated this test in light of its duty to construe antitrust exemptions narrowly. 458 U.S. at 126.

C. State Regulation, Again: Fabe

The 1993 ruling in *Fabe* confirmed that the *National Securities* analysis controls for cases under the state regulation element of § 2(b)'s reverse preemption clause, and is broader than the standard under the antitrust clause.

In *Fabe*, the Court addressed an Ohio statute that conferred a low priority on claims of the United States in proceedings to liquidate insolvent insurance companies. The federal priority statute accords first priority to such claims. The case turned on whether the Ohio statute was enacted "for the purpose of regulating the business of insurance," and thus was preserved from federal preemption by the McCarran-Ferguson Act.

Fabe noted initially that "[t]his Court has had occasion to construe this phrase only once," 113 S. Ct. at 2208, that is, in *National Securities*. In distinguishing between the reverse preemption clause and the antitrust clauses in § 2(b), the Court explained that "the first [state regulation] clause contains the word 'purpose,' a term that is significantly missing from the second [antitrust] clause." *Id.* at 2210 n. 6.

The Court then criticized the petitioner in *Fabe* for relying too heavily upon the antitrust-based standard set forth in *Royal Drug* and *Pireno* and "[m]inimizing the analysis of National Securities . . . ." 113 S. Ct. at 2208. "Both Royal Drug and Pireno . . . involved the scope of the antitrust immunity located in the *second* clause of § 2(b). We deal here with the *first* [state regulation] clause, which is not so narrowly circumscribed." *Id.* at 2209 (emphasis in original). The Court later elaborated:

> the first clause of § 2(b) was intended to further Congress' primary objective of granting the States broad regulatory authority over the business of insurance. The second clause accomplishes Congress' secondary goal, which was to carve out only a narrow exemption for 'the business of insurance' from the federal antitrust laws.

Id. at 2210.

The Court then applied the *National Securities* standard, which covers "[t]he broad category of laws enacted 'for the purpose of regulating the business of insurance' consist[ing] of laws that possess the 'end, intention, or aim' of adjusting, managing, or controlling the business of insurance," 113 S. Ct. at 2210 (quoting Black's Law Dictionary 1236, 1286 (6th ed. 1990)). The Court held that because of the broad coverage of the reverse preemption clause, the Ohio priority statute prevailed.

Fabe acknowledged that, "[t]o be sure, the Ohio statute does not directly regulate the 'business of insurance' by prescribing the terms of the insurance contract or by setting the rates charged by the insurance company." 113 S. Ct. at 2209. Nevertheless, *Fabe* held that "[b]ecause the Ohio statute is 'aimed at protecting or regulating' the performance of an insurance contract, . . . it follows that it is a law 'enacted for the purpose of regulating the business of insurance,' within the meaning of the first clause of § 2(b)." *Id.* at 2210.

D. The Purpose of § 626.988 Is to Regulate the Business of Insurance

After *Fabe*, the question in this case is whether an aim of Section 626.988 of Florida's Insurance Code is to regulate, directly or indirectly, the relationship between insurance companies and their policyholders. Even more clearly than for the state statute in *Fabe*, the answer here is yes.

Trial testimony established that the purposes of section 626.988 include: (1) preventing overreaching by financial institutions in the sale of insurance; (2) strengthening the financial stability of insurance companies, including their ability to pay their policyholders upon demand, by removing potential incentives to assume bad risks; and (3) preventing the loss of arms-length transactions and objectivity between insurer and policyholder when a bank becomes involved in the relationship. *Barnett Bank, N.A. v. Gallagher*, 43 F.3d 631, 635-36 (11th Cir.) *cert. granted*, 116 S. Ct. 39(1995).[4] Moreover, this Court has long held the "licensing of [insurance] companies and their

[4] *See also Glendale Fed. Sav. & Loan Ass'n v. Department of Ins.*, 587 So. 2d 534, 536 (Fla. Ct. App. 1991) (legislative purposes of § 626.988 include prevention of consumer coercion and unfair trade practices); *Production Credit Ass'n v. Department of Ins.*, 356 So.2d 31, 32 (Fla. Ct. App. 1978) ("[t]he Legislature has determined that there is potential for abuse inherent in financial institutions being involved in the sale of insurance, and that the licensing of employees of financial institutions as insurance agents is not in the public interest").

agents" to be within the scope of the McCarran-Ferguson Act. *National Securities*, 393 U.S. at 460 (citing *Robertson v. California*, 328 U.S. 440 (1946)).

Few matters are as fundamental to the insurer-policyholder relationship as the manner and circumstances in which the insurance policy may be sold. Indeed, the stated purpose of the Florida Insurance Code's Unfair Insurance Trade Practice Act, — of which § 926.988 is a part, is to "defin[e] . . . practices in this state which constitute unfair methods of competition or unfair or deceptive acts or practices and . . . prohibit[] the trade practices so defined . . . ." Fla. Stat. Ann. § 626.951. Section 622.988 certainly has the "purpose," directly or indirectly, to regulate the insurer-policyholder relationship, and thus falls within the reverse preemption clause of § 2(b).

CONCLUSION

For the reasons set forth above, the decision of the Eleventh Circuit Court of Appeals should be affirmed.

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